BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CORY SAYLOR	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,028,185
WESTAR ENERGY, INC.	)	
Self-Insured Respondent	)	

ORDER

Respondent appealed the July 30, 2007, Award entered by Administrative Law Judge John D. Clark. The Workers Compensation Board heard oral argument on October 19, 2007.

APPEARANCES

Chris A. Clements of Wichita, Kansas, appeared for claimant. Terry J. Torline of Wichita, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

Claimant alleged he injured his left knee due to the cumulative traumas he sustained at work each and every working day through February 6, 2006, which was the last day claimant worked for respondent before undergoing knee replacement surgery on February 7, 2006. In the July 30, 2007, Award, Judge Clark found claimant injured his left knee at work and that under K.S.A. [2005 Supp.] 44-508(d) claimant's accident date was March 28, 2006, which was the date respondent received written claim. The Judge awarded claimant permanent partial disability benefits under the schedule of K.S.A. 44-510d for a 37 percent impairment to his left leg.

Respondent contends Judge Clark erred and the Award should either be reversed or modified. Respondent argues claimant failed to prove his knee injury arose out of and in the course of his employment and that he provided respondent with timely notice of the accidental injury. In the alternative, if claimant did sustain a compensable accident, respondent argues the date of accident is February 5 *[sic]*, 2006, the date claimant was taken off work before surgery. And if claimant is awarded permanent disability benefits in this claim, respondent contends they should be based upon a 30 percent impairment to the lower extremity. Finally, respondent contends claimant's medical bills should be paid under the provision for unauthorized medical benefits.

Conversely, claimant requests the Board to affirm the Award.

The issues before the Board on this appeal are:

1. Did claimant injure his left knee in an accident that arose out of and in the course of his employment with respondent?

2. If so, what is the date of accident for that injury under K.S.A. 2005 Supp. 44-508(d) and did claimant provide respondent with timely notice of the accident?

3. If claimant is entitled to receive permanent disability benefits, should claimant's award be reduced because of preexisting functional impairment under K.S.A. 2005 Supp. 44-501(c)?

4. If claimant has sustained a compensable injury, is respondent liable for the medical bills incurred for claimant's left knee replacement surgery under K.S.A. 44-510j(h) or is respondent's liability limited to the sum of $500 as unauthorized medical expense?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

Respondent is an electric utility company. Claimant has worked for respondent for more than 30 years as a groundman, truck driver, apprentice cable splicer, journeyman cable splicer, and for the last six years as a cable splicer foreman.

Claimant contends he is entitled to receive workers compensation benefits in this claim for cumulative trauma he sustained to his left knee. For at least the last 25 years,

claimant's job has required him to perform strenuous physical labor, oftentimes on his knees. Claimant generally described his work for respondent, in part:

> My job is, I run a three-man crew, and we go out and put in power to residential and downtown buildings; and the details of when we're hooking up transformers and terminal cans, we're on our knees all day long, and bending over inside the equipment terminating it, or putting it together; and when I'm not doing that on the rough ground and whatnot in the residential, I'm downtown on the asphalt and concrete, and I'm climbing in and out of manholes and transformer vaults.[1]

And when working in the manholes and transformer vaults, claimant would oftentimes work on his knees, depending upon how high the cable was wrapped.

During his many years working for respondent, claimant began experiencing left knee symptoms. Claimant estimated that approximately 20 years ago he underwent arthroscopic surgery to his left knee in which the surgeon removed some loose cartilage. Despite that surgery, claimant's left knee symptoms never completely resolved and in approximately October 2004 claimant received a cortisone injection for left knee pain.

As claimant continued to work for respondent his left knee symptoms progressively worsened. Eventually, claimant's left knee pain increased to the point that he desired additional medical treatment. Consequently, claimant sought treatment from his personal physician, who referred claimant to Dr. John R. Schurman, II, an orthopedic surgeon.

Claimant first saw Dr. Schurman in early January 2006. And on February 7, 2006, the doctor performed a left knee replacement. Claimant performed his regular work duties through February 6, 2006, before undergoing that surgery.

While recovering from the left knee surgery, claimant spoke with a co-worker who thought claimant might be eligible to receive workers compensation benefits. Following that conversation, claimant contacted his present attorney and initiated this claim by mailing respondent a written claim for workers compensation benefits. The parties represent respondent received that written claim on March 28, 2006.[2]

After recuperating from his left knee surgery, claimant returned to work for respondent in April 2006 and has resumed his regular work activities.

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[1] R.H. Trans. at 8.

[2] Respondent's Brief at 3 (filed Sept. 7, 2007).

1. Did claimant injure his left knee in an accident that arose out of and in the course of his employment with respondent?

The evidence is uncontradicted that claimant's work was physically demanding and that he climbed ladders, worked on both concrete surfaces and uneven ground, and oftentimes worked on his knees. Claimant's supervisor confirmed the work was hard on a worker's legs and back.

Claimant's medical expert witness, Dr. C. Reiff Brown, believed claimant's work activities aggravated and accelerated the degenerative arthritis in his left knee. Dr. Schurman, on the other hand, was not asked his opinion of whether claimant's work activities aggravated or accelerated the arthritic condition in claimant's left knee.

The Board finds it is more probably true than not that claimant's work activities accelerated the arthritic condition in his left knee. Accordingly, the Board affirms the Judge's finding that claimant's left knee injury arose out of and in the course of his employment with respondent. Moreover, the Board concludes that acceleration of the arthritic condition in claimant's left knee resulted in the February 2006 left knee replacement.

2. What is the date of accident for claimant's left knee injury under K.S.A. 2005 Supp. 44-508(d) and did claimant provide respondent with timely notice of the accident?

Starting with the bright line rule set forth in *Berry*,[3] the appellate courts have struggled with the date of accident for repetitive or cumulative trauma injuries that may occur over a considerable period of time.[4] Accordingly, the legislature modified the Workers Compensation Act for certain accidents occurring after June 30, 2005.

Regarding repetitive use, cumulative trauma, or microtrauma injuries, the Workers Compensation Act now designates the accident date to be the date the authorized physician prohibits the worker from working or the date the physician restricts the worker

[3] *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

[4] See *Kimbrough v. University of Kansas Med. Center*, 276 Kan. 853, 79 P.3d 1289 (2003); *Lott-Edwards v. Americold Corp.*, 27 Kan. App. 2d 689, 6 P.3d 947 (2000); *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999); *Anderson v. Boeing Co.*, 25 Kan. App. 2d 220, 960 P.2d 768 (1998); *Durham v. Cessna Aircraft Co.*, 24 Kan. App. 2d 334, 945 P.2d 8, *rev. denied* 263 Kan. 885 (1997); *Condon v. Boeing Co.*, 21 Kan. App. 2d 580, 903 P.2d 775 (1995).

from performing the work that caused the repetitive trauma injury. K.S.A. 2005 Supp. 44-508(d) provides, in part:

> In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the **authorized** physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. (Emphasis added.)

But if the *authorized* physician neither prohibits nor restricts the worker from performing the injurious work, the designated date of accident is the earliest of (1) the date the worker gives the employer written notice of the injury or (2) the date the condition is diagnosed as work-related, if that information is communicated to the worker in writing. And in the event none of the above criteria are met, the accident date shall be based upon the evidence.

Designating only one date as the date of accident for an accidental injury that occurs over a period of time is a legal fiction. Nonetheless, it is necessary in order to set the appropriate compensation rate and determine such issues as whether there was timely notice and timely written claim.

Moreover, the Kansas Supreme Court has recently sent two strong messages that the Workers Compensation Act should be applied as written. In *Graham*,[5] the Kansas Supreme Court rejected an interpretation of the wage loss prong in the work disability formula that did not comport with the literal reading of K.S.A. 44-510e. The Kansas Supreme Court wrote, in part:

> When a statute is plain and unambiguous, a court must give effect to its express language, rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statute's language is clear, there is no need to resort to statutory construction.[6]

And in *Casco*,[7] the Kansas Supreme Court overturned 75 years of precedent on the basis that earlier decisions did not follow the literal language of the Act. The Court wrote:

> When construing statutes, we are required to give effect to the legislative intent if that intent can be ascertained. When a statute is plain and unambiguous, we must

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[5] *Graham v. Dokter Trucking Group*, 284 Kan. 547, 161 P.3d 695 (2007).

[6] *Id.* at Syl. ¶ 3.

[7] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *reh'g denied* (2007).

> give effect to the legislature's intention as expressed, rather than determine what the law should or should not be. A statute should not be read to add that which is not contained in the language of the statute or to read out what, as a matter of ordinary language, is included in the statute.[8]

Applying the plain and unambiguous language of K.S.A. 2005 Supp. 44-508(d), the Board finds the date of accident for the repetitive injury to claimant's left knee is March 28, 2006, when respondent received a written claim and, thus, a written notice of claimant's left knee injury. Consequently, notice to respondent was timely.[9]

The Board rejects respondent's argument that Dr. Schurman should be treated as the authorized physician for purposes of determining the date of accident. In short, Dr. Schurman was not authorized by respondent or the Judge to treat claimant. Instead, the doctor began treating claimant after a referral from claimant's personal physician.

3. Should claimant's award be reduced because of preexisting functional impairment under K.S.A. 2005 Supp. 44-501(c)?

Both Dr. Brown and Dr. Schurman rated claimant under the fourth edition of the AMA *Guides*[10] and both determined claimant has a 37 percent impairment to his left leg following the left knee replacement. The only issue concerning claimant's functional impairment is whether the evidence established the extent of any preexisting impairment that would decrease claimant's award. The Workers Compensation Act provides, in part:

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.[11]

And K.S.A. 44-510d requires that functional impairment be determined based upon the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, if the impairment is addressed in that publication. The Board has held that any preexisting functional impairment must also be determined utilizing the same

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[8] *Id.* at Syl. ¶ 6.

[9] See K.S.A. 44-520.

[10] American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

[11] K.S.A. 2005 Supp. 44-501(c).

criteria.[12] Finally, it is respondent's burden to prove the extent of any preexisting functional impairment.[13]

The Board finds the evidence does not establish the extent of claimant's preexisting functional impairment. Neither Dr. Brown nor Dr. Schurman knew the details of claimant's earlier arthroscopic surgery. Dr. Brown testified "it would be really pretty much a guess."[14] And Dr. Schurman testified he really had "no way of knowing" what impairment claimant may have had from the earlier arthroscopic surgery and that he was not comfortable offering an opinion regarding claimant's preexisting impairment.[15] In short, the difficulty proving the extent of any preexisting functional impairment is summarized in statements made by respondent's counsel at Dr. Schurman's deposition:

> Doctor, I know it has been a little bit difficult to figure out exactly what surgical procedure occurred 20 years ago. We know that he had a surgical procedure and we know it was an arthroscopy. We don't know exactly what it was.[16]

Moreover, when the record closed the parties still did not know what surgical procedure was performed in the arthroscopy.

4. Is respondent liable for the medical bills incurred for claimant's left knee replacement surgery under K.S.A. 44-510j(h) or is respondent's liability limited to the sum of $500 as unauthorized medical expense?

The Board finds respondent is responsible for the medical bills claimant incurred for his left knee replacement. The Workers Compensation Act provides that employers are liable for the medical treatment that a worker obtains when the employer either refuses or neglects to provide treatment. K.S.A. 44-510j(h) reads, in part:

> If the employer has knowledge of the injury and refuses or neglects to reasonably provide the services of a health care provider required by this act, the employee

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[12] *Leroy v. Ash Grove Cement Company*, No. 88,748 (Kansas Court of Appeals unpublished opinion filed April 4, 2003).

[13] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

[14] Brown Depo. at 21.

[15] Schurman Depo. at 7, 18, 19.

[16] *Id.* at 20.

> may provide the same for such employee, and the employer shall be liable for such expenses subject to the regulations adopted by the director.

This statute is applicable. Claimant's testimony is credible that upon learning he would undergo the knee replacement he advised his supervisor about the operation and that he believed his work was responsible.[17] The Board finds respondent had knowledge of the left knee injury and claimant's need for medical treatment but neglected to provide claimant with a health care provider.

In conclusion, the Board concludes the July 30, 2007, Award should be affirmed. The Board adopts the findings and conclusions set forth by the Judge to the extent they are consistent with the above.

AWARD

WHEREFORE, the Board affirms the July 30, 2007, Award entered by Judge Clark.

The record does not contain a written fee agreement between claimant and his attorney. K.S.A. 44-536(b) requires the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire any fee in this matter, counsel must submit the written agreement to the Judge for approval as required by K.S.A. 44-536.

IT IS SO ORDERED.

Dated this ____ day of January, 2008.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

[17] R.H. Trans. at 14.

CONCURRING OPINION

The undersigned agree with the result reached by the majority but would do so for a different reason. We would find claimant's date of accident for claimant's series of accidents to be February 6, 2006, the last day claimant worked before his surgery. This is because when claimant returned to work it was with restrictions. Claimant's restrictions were accommodated by respondent. Therefore, the last day claimant performed his regular job duties for respondent was on February 6, 2006.

We agree that none of the triggering events described in K.S.A. 2005 Supp. 44-508(d) occurred until March 28, 2006, when claimant made written claim and thus gave respondent written notice of the injury. However, unlike the majority, we do not think the Legislature contemplated a date of accident occurring after the last day an injured worker performed the offending work for his employer. Accordingly, under the statute, the accident date should be based upon the evidence. The evidence indicates that claimant's series of injuries ended on February 6, 2006, because after this date claimant was placed on light duty and suffered no additional injury to his knee.

Claimant's notice of accident was timely because just cause exists for extending the time from 10 to 75 days. Claimant was not aware that his series of traumas to his knee caused by the wear and tear of performing his normal job duties for respondent constituted an accident for purposes of workers compensation.

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BOARD MEMBER

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BOARD MEMBER

c: Chris A. Clements, Attorney for Claimant
Terry J. Torline, Attorney for Respondent
John D. Clark, Administrative Law Judge